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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARCO OIL AND GAS COMPANY, DIVISION OF ATLANTIC RICHFIELD COMPANY,

Petitioner,

v.

WILLISTON BASIN INTERSTATE PIPELINE COMPANY AND FEDERAL ENERGY REGULATORY COMMISSION,

Respondents.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE	1
1. The Regulatory Background	3
2. FERC's Decision That the Procedures of § 503 of the NGPA Need Not Be Used for the Tight Formation Designation	4
3. FERC Regulations for Tight Formation Designations Through § 501 Rulemaking	5
4. The Jurisdictional Agency's Recommendation	6
5. FERC's Commodity Value Rulemaking	6
6. FERC Order No. 338	8
7. Other Government Agency Reports	9
a. The DOE Reports	9
b. The GAO Report	10
8. FERC Order No. 338-A	11
9. The Court of Appeals Decision	12
ARGUMENT	
By Erroneously Holding That It Lacked Jurisdiction to Review FERC Order Nos. 338 and 338-A, the Court Of Appeals Failed to Apply the Standards Set Forth by this Court to Determine Whether FERC's Actions in Issuing those Orders Were Arbitrary and Capricious	13
CONCLUSION	17

TABLE OF AUTHORITIES

Cases: PAGE

Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974) 14

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (1962) 14

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 14

Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)... 13

Motor Vehicle Manufacturers Assoc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 13, 14

Pennzoil Co. v. FERC., 671 F2d 119 (5th Cir. 1982) ... 2

Permian Basin Area Rate Cases, 390 U.S. 747 (1968) .. 13

Transcontinental Gas Pipeline Corp. v. State Oil and Gas Board of Mississippi, 474 U.S. 409 (1986) 15

Administrative Decisions:

High-Cost Gas Produced from Tight Formations (*Wyoming-14* and *Wyoming-15*), Order No. 338, 48 Fed. Reg. 46,268 (Oct. 12, 1983), FERC Statutes and Regulations (CCH) ¶ 30,505 (1983) .....*passim*

High-Cost Gas Produced from Tight Formations (*Wyoming-14* and *Wyoming-15*), "Order Denying Request for Rehearing and Petition to Reopen and Remand," Order No. 338-A, 33 FERC (CCH) ¶ 61,175 (1985).....*passim*

PAGE

Regulations Covering High-Cost Natural Gas Produced from Tight Formations, Order No. 99, 45 Fed. Reg. 56034 (Aug. 22, 1980), FERC Statutes and Regulations (CCH) 30,183 (1980), *reh'g denied, Order Denying Rehearing and Clarifying Order No. 99*, Order No. 99-A, 45 Fed. Reg. 71563 (Oct. 29, 1980), FERC Statutes and Regulations (CCH) ¶ 30,198 (1980), *aff'd, Pennzoil Co. v. FERC*, 671 F.2d 119 (5th Cir. 1982) ..... *passim*

Statutes:

Natural Gas Policy Act of 1978:

Section 107; 15 U.S.C. § 3317 ..... *passim*

Section 107(b); 15 U.S.C. § 3317(b) 2, 3

Section 107(c)(5); 15 U.S.C. § 3317(c)(5) 2

Section 123; 15 U.S.C. § 3333 9

Section 501, 15 U.S.C. § 3411 ..... 5, 6, 12

Section 502, 15 U.S.C. § 3412 6

Section 503, 15 U.S.C. § 3413 ..... 4, 5, 6, 12

Section 506, 15 U.S.C. § 3416 ..... 4, 5, 6

Regulations Under the Natural Gas Policy Act of 1978:

18 C.F.R. § 271.703 ..... 5, 6

Miscellaneous:

Department of Energy Report (July, 1984) 9, 10, 15, 16

Department of Energy Report (January, 1985) 10, 15, 16

Problems Identified in FERC's Incentive Pricing Program for Natural Gas from Tight Formations, General Accounting Office Report, GAO/RCED-85-49 (June 13, 1985) 10, 11, 15, 16

PAGE

FERC Notice of Proposed Rulemaking to Designate the Frontier and Dakota Group Formations as Tight Formations (Nov. 22, 1982) 6

FERC Notice of Proposed Rulemaking on Limitation on Incentive Prices for High-Cost Gas to Commodity Values, 48 Fed. Reg. 7469 (Feb. 19, 1983) 6, 7, 8

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STATEMENT OF THE CASE

Respondent Williston Basin Interstate Pipeline Company ("WBI") submits this memorandum pursuant to Rule 19.6 of the Rules of this Court in support of the petition by ARCO Oil and Gas Company, Division of Atlantic Richfield Company ("ARCO"), for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia in this case. WBI is an interstate pipeline which purchases natural gas from ARCO, among other suppliers, for delivery to the citizens of Wyoming, Montana, and North and South Dakota[1].

1 WBI is a wholly owned subsidiary of and, as of January 1, 1985, successor in interest to MDU Resources Group with respect to a contract to purchase natural gas from ARCO. WBI has no subsidiaries of its own. For convenience, both companies are referred to herein as WBI.

The Court of Appeals held, *sua sponte*, that it lacked jurisdiction of WBI's petition to review Order Nos. 338, 48 Fed. Reg. 46,268 (Oct. 12, 1983), FERC Statutes and Regulations (CCH) ¶ 30,505 (1983), and 338-A, 33 FERC (CCH) ¶ 61,175 (1985), of the Federal Energy Regulatory Commission ("FERC") designating certain overlapping rock formations in Wyoming known as the Dakota Group as "tight formations," thereby allowing ARCO to obtain higher prices from WBI under Section 107 of the Natural Gas Policy Act of 1978 ("NGPA")[2] for natural gas produced from those formations. As discussed below, WBI believes that the Court should issue a writ of certiorari because of the important issues this case presents for the administration of the NGPA. By holding that it lacked jurisdiction to review the subject orders, the Court of Appeals failed to correct FERC's arbitrary and capricious approach to administering that statute—an approach directly contrary to the intent of Congress and to the public interest.

Section 107 of the NGPA permitted FERC to prescribe higher prices for gas *only* "to the extent that such special price is *necessary* to provide reasonable incentives for the production of such high cost natural gas." 15 U.S.C. § 3317(b) (emphasis added). WBI contended in the Court of Appeals that the FERC orders at issue were arbitrary and capricious because they were based on the rote application of generic criteria established in 1980 by FERC Order Nos. 99 and 99-A[3] for the designation of tight formations despite (a) overwhelming evidence that, as FERC itself had repeatedly acknowledged, market conditions had changed drastically; (b) FERC's own determination that prices in excess of the commodity value of gas, because of their adverse impact on consumers, were

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2 15 U.S.C. § 3317(c)(5) (1982). The NGPA was enacted into law by Pub. L. 95-621.

3 *Regulations Covering High-Cost Natural Gas Produced From Tight Formations*, Order No. 99, 45 Fed. Reg. 56,034 (Aug. 22, 1980), FERC Statutes and Regulations (CCH) ¶ 30,183 (1980), *reh'g denied, Order Denying and Clarifying Order No. 99*; Order No. 99-A, 45 Fed. Reg. 71,563 (Oct. 29, 1980), FERC Statutes and Regulations (CCH) ¶ 30,198 (1980), *aff'd Pennzoil v. FERC*, 671 F.2d 119 (5th Cir. 1982).

"contrary to the public interest"; and (c) clear evidence that, because ARCO would have obtained a substantial profit even without incentive pricing, a special price was not "necessary to provide reasonable incentives" to ARCO for production of gas from the formations, as the enabling statute required. By reaching out to hold, through a convoluted and erroneous assessment of legislative intent, that it lacked jurisdiction of WBI's claims, the Court of Appeals failed to correct, as the decisions of this Court require, the action of an agency which ignored essential facts, its statutory mandate, and its own assessment of the public interest in issuing the subject orders.

1. The Regulatory Background

In passing the NGPA, Congress sought to encourage natural gas exploration through incentive pricing while mitigating the consumer impact of the higher prices. Section 107 of the statute authorized FERC to prescribe, by rule or order, a maximum price above the otherwise lawful maximum price for five specified categories of natural gas, "to the extent that such special price is necessary to provide reasonable incentives for the production of such high-cost natural gas." 15 U.S.C. § 3317(b). Among other things, § 107 permitted incentive pricing for natural gas produced under such conditions as FERC "determines to present extraordinary risks or costs." *Id.* § 3317(b)(5). The decision as to whether gas was produced under such conditions was left to the discretion of FERC.

FERC exercised the discretion afforded it by Congress by promulgating a series of interim regulations in Docket No. RM 79-76 which culminated in Order Nos. 99 and 99-A, establishing an incentive maximum lawful price for certain natural gas produced from "tight formations," *i.e.*, formations in which the components of a sedimentary layer of rock are cemented together in a manner that greatly hinders the flow of gas. FERC established standards with respect to permeability and flow to be used to identify tight formations. Among other things, Order No. 99 provided a two step process for determining whether a producer was entitled to charge an increased price for tight formation gas. First, the geological formation

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2. The court of appeal's narrow holding is also of little legal or practical moment because the Commission has since modified its regulations prospectively so as to apply Section 503 procedures to a local jurisdictional agency's recommenation whether a particular geologic formation should be designated a "tight formation" (see 52 Fed. Reg. 29003 (1987)).[4] As a result of that regulatory change, Section 503 will preclude judicial review of any future Commission decision to affirm a local jurisdictional agency's recommendation (52 Fed. Reg. 29003 (1987)). Hence, the controversy presented in this case—whether the Commission can avoid that result by relying on its rulemaking authority under Section 501 of NGPA—will not recur in future cases.[5] Contrary to petitioner's suggestion (Pet. 24),

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sion's decision to affirm BLM's recommendation was arbitrary and capricious. The court of appeals, however, did not address that issue and the petition presents only the threshold jurisdictional issue. Nor does this case present the issue whether the court of appeals' decision mandates the invalidation of the "tight formation"designations made by the Commission in this case. That issue is the subject of subsequently-filed litigation (by Williston) now pending before a federal district court. See *Williston Basin Interstate Pipeline Co. & MDU Resources Group, Inc.* v. *Burford*, No. 87-1757 (D.D.C. filed June 29, 1987).

[4] The Commission has also applied Section 503 procedures in cases now pending before it. See *Texas Railroad Comm'n*, 40 F.E.R.C. ¶ 61,100, remanded, 41 F.E.R.C. ¶ 61,213 (1987); *Oklahoma Corp. Comm'n*, 40 F.E.R.C. ¶ 61,102, rev'd in part, 41 F.E.R.C. ¶ 61,214, aff'd in part, 41 F.E.R.C. ¶ 61,215 (1987); *Colorado Oil & Gas Corp.*, 40 F.E.R.C. ¶ 61,101 (1987).

[5] In any event, there are likely to be few designations of "tight formation" gas in the future. Because there are only a limited number of tight formations in the United States, the number of requests for designations has steadily decreased over the last several years. The Commission has processed 240 local jurisdictional agency recommendations since it promulgated its "tight formation" rule in 1980, with the vast majority of those recommendations occurring during the first

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no serious claim can be maintained that the Commission lacks authority to promulgate these new regulations. But, in any event, the validity of the new regulations is a matter to be litigated, if at all, in a future case and therefore does not provide a reason for further review now.

3. Finally, review is not warranted on the ground that "[t]he holding below also has generated uncertainty, and questions as to retroactive application of the holding and as to the status of tight formation designation orders issued prior to July 29, 1987" (Pet. 25). In the vast majority of those prior cases, the Commission, as in this case, affirmed the local jurisdictional agency determinations. No party sought judicial review in any of those cases and therefore the issue whether a court of appeals would have had jurisdiction over the case had such review been sought is wholly theoretical. In any event, the time for seeking such further review has long since ended (see 15 U.S.C. 3416(a)(4)), and those prior decisions may not now be reopened.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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five years. In 1985 and 1986, the Commission received only seven and two recommendations, respectively. The Commission has received only one recommendation so far n 1987.

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